

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





76-1061

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United States Court of Appeals

FOR THE SECOND CIRCUIT

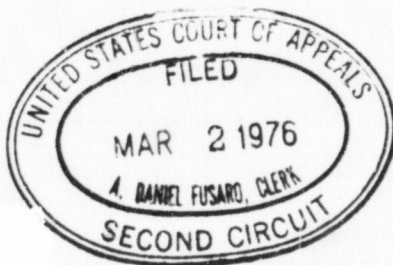
Docket No. 76-1061

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*  
—against—

RICHARD KESTENBAUM,  
*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANT-APPELLANT'S APPENDIX



THEODORE ROSENBERG  
*Attorney for Defendant-Appellant*  
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Brooklyn, New York 11201  
Tel. No.: 858 - 0589

ROBERT B. FISKE, JR.,  
*United States Attorney for the  
Southern District of New York,*  
One St. Andrews Plaza,  
New York, N. Y.

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

-against-

RICHARD KESTENBAUM,

Defendant.

INFORMATION

73 Cr. 212

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The United States Attorney charges:

On or about the 1st day of July, 1972 in the Southern  
District of New York,

RICHARD KESTENBAUM

the defendant, unlawfully, wilfully and knowingly falsely made,  
forged and counterfeited a writing, namely, the endorsement of  
the payee on a check, to wit, the words

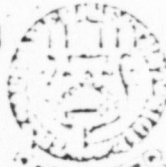
Jerome Foster

on the back thereof, for the purpose of obtaining from the United  
States and its officers and agents a sum of money, the check being  
a genuine obligation of the United States, and of the following tenor:

(Title 18, United States Code, Section 495.)



U.S. DEPT. OF  
TREASURY  
DIVISION OF  
DISBURSEMENT



253 6270847

AUSTIN, TEXAS

CHECK NO. 54,157,065  
SYMBOL 2205

UNITED STATES OF AMERICA

PAY TO THE

ORDER OF JEROME FOSTER

03965773 076

DOLLARS 146.00

07 01 72

210 EAST BROADWAY  
NEW YORK NY 10002

65 06 21

VA COM

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00000014600

When an individual is the individual  
payee, the payee must be the individual  
payee. If the payee is an organization,  
the payee must be the organization.  
The payee must be the individual payee.  
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SECOND COUNT

The United States Attorney further charges:

On or about the 1st day of July, 1972, in the Southern District of New York, RICHARD KESTENBAUM, the defendant, unlawfully, wilfully and knowingly falsely made, forged and counterfeited a writing, namely, the endorsement of the payee on a check, to wit, the words Jerome Foster on the back thereof, for the purpose of obtaining from the United States and their officers and agents a sum of money, the check being that described in the First County of this Information.

(Title 18, Section 495, United States Code.)



THIRD COUNT

The United States Attorney further charges that:

On or about the 3rd day of July, 1972 in the Southern District of New York, RICHARD KESTENBAUM, the defendant, unlawfully, wilfully and knowingly falsely made, forged and counterfeited a writing, namely, the endorsement of the payee on a check, to wit, the words Thomas Seligman on the back thereof, for the purpose of obtaining from the United States and its officers and agents a sum of money, the check being a genuine obligation of the United States, and of the following tenor:

(Title 18, United States Code, Section 495).

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TREASURY  
FEDERAL OF  
ACCOUNTS  
DIVISION OF  
DISBURSEMENT

NEW YORK, NEW YORK

Check No. 74,534,248  
BYMDOL 3042

Treasury of the United States

DO NOT FOLD OR CRUMPLE  
KNOW YOUR RIGHTS - REQUEST IDENTIFICATION



PAY TO THE

ORDER OF THOMAS SELIGMAN  
477 FUR DR  
NEW YORK NY

134-22-9377  
46 A  
10002 SOC SEC FUR JUN

1228 00

07 03 73

*R.K.*  
*Jan 3, 1973*  
*1-3-73*

0000000511

IDENTIFICATION PROCEDURE

When cashing this check for the individual payee, you should require full identification and endorsement in your presence, as claims against endorser may otherwise result.

The payee should endorse below in ink or indelible pencil.

If the endorsement is made by mark (X) it must be witnessed by two persons who can write, giving their places of residence in full.

It is suggested that this check be promptly negotiated.

*Thomas Seligman*

RECEIVED  
JAN 3 1973  
FEDERAL RESERVE BANK  
NEW YORK

FOURTH COUNT

The United States Attorney further charges that:

On or about the 3rd day of July, 1972 in the Southern District of New York, RICHARD KESTENBAUM the defendant, unlawfully, wilfully and knowingly falsely made, forged and counterfeited a writing, namely, the endorsement of the payee on a check, to wit, the words Jerome Foster on the back thereof, for the purpose of obtaining from the United States and their officers and agents a sum of money, the check being that described in the Third Count of the Information.

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WHITNEY NORTH SEYMOUR, Jr.  
United States Attorney



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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

- - - - - X  
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UNITED STATES OF AMERICA :  
:  
vs. :  
:  
RICHARD KESTENBAUM, : 73 Cr.  
:  
Defendant. :  
:  
- - - - - X

New York, N. Y.  
March 12, 1973.

Before:

HON. KEVIN THOMAS DUFFY,  
District Judge.

Appearances:

WHITNEY NORTH SEYMOUR, JR., ESQ.,  
United States Attorney,  
For the Government;  
ROBERT JUPITER, ESQ.,  
Assistant United States  
Attorney.

THEODORE ROSENBERG, ESQ.,  
Attorney for defendant.

- - -

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2 THE COURT: United States v. Richard Kestenbaum.

3 MR. ROSENBERG: Your Honor, this is on for a  
4 waiver of indictment, and I would appreciate if the Court  
5 can take it now because I am actually engaged with three other  
6 attorneys in another matter.

7 THE COURT: Have you seen the information and  
8 the waiver?

9 MR. JUPITER: I am handing defense counsel a copy  
10 of the waiver form and the proposed information.

11 MR. ROSENBERG: At this time, if your Honor please,  
12 the defendant Richard Kestenbaum wishes to waive indictment  
13 and plead to the one count of the information.

14 BY THE COURT:

15 Q Mr. Kestenbaum, what is your age presently?

16 A Nineteen.

17 Q And how far did you go in school?

18 A I am through high school and I am in college right  
19 now.

20 Q You are in college right now?

21 A Yes, sir.

22 Q What college are you going to?

23 A Bronx Community College.

24 Q Have you been recently under the care of a physi-  
25 cian or a psychiatrist?

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A Psychiatrist.

Q You have an attorney, I see, Mr. Rosenberg, and he is the attorney of your choice; is that correct?

A Yes, sir.

Q I note that the United States Attorney's office has supplied you with a copy of the charges against you. Do you understand what those charges are?

A Yes, sir.

Q Mr. Kestenbaum, the charge basically is that you unlawfully forged a signature on a check with the name Jerome Foster. Do you understand the charge against you?

A Yes, sir.

THE COURT: Will the record reflect that I mis-spoke when I talked about the charge against the defendant.

Q Mr. Kestenbaum, what I meant was the proposed charge. When I say "proposed charge," I mean that very seriously. You realize, for example, that you can refuse to waive indictment and that you can have this entire matter go to a grand jury which may or may not indict you. Do you understand that?

A Yes, sir.

Q You know that the grand jury is made up of 23 people and the government would have to convince at least 16 of those 23 that you were probably guilty of the crime



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2       with which you may be charged.   Do you understand that?

3           A     Yes, sir.

4           Q     Now, if you decide to waive indictment the case  
5       will not be presented to the grand jury by the United States  
6       Attorney's office and will proceed on the information just as  
7       if you had been indicted.   Do you understand that?

8           A     Yes, sir.

9           Q     You have discussed this matter of waiver of indict-  
10      ment with your attorney?

11          A     Yes, sir.

12          Q     Have any threats or promises been made to you to  
13      waive indictment?

14          A     No, sir.

15          Q     Do you wish to waive indictment and proceed on an  
16      information prepared by the United States Attorney's office?

17          A     Yes, sir.

18                THE COURT:   Mr. Rosenberg, do you know of any  
19      reason why the defendant should not waive indictment?

20                MR. ROSENBERG:   No, sir.

21                BY THE COURT:

22           Q     Mr. Kestenbaum, there is before you a waiver of  
23      indictment form.   Would you be good enough to sign that so  
24      that you can waive indictment?

25                       (Defendant signs waiver of indictment )

1 w

2 Q Mr. Kestenbaum, you have read the waiver of in-  
3 dictment form?

4 A Yes, sir.

5 Q And you signed it freely?

6 A Yes, sir.

7 THE COURT: The Court will accept the waiver of  
8 indictment

9 Mr. Rosenberg, do you wish the information read to  
10 the defendant?

11 MR. ROSENBERG: No, your Honor, we waive the  
12 reading.

13 BY THE COURT:

14 Q Mr. Kestenbaum, you have been charged by informa-  
15 tion with two counts, one, the forging of a treasury check,  
16 and the other with the uttering or passing of that check.  
17 How do you plead?

18 A Guilty.

19 Q Pardon?

20 A Guilty.

21 Q Mr. Kestenbaum, is your plea of guilty being made  
22 completely voluntarily?

23 A Yes, sir.

24 Q Do you understand your rights?

25 A Yes, sir.



1 W

2 Q Do you know what the consequence of your plea is?

3 A Yes, sir.

4 Q In fact, you are guilty of the crime charged?

5 A Yes, sir.

6 Q Take a look at the check which is stapled on to  
7 the first page of the information. Is that the check which  
8 you signed with the name Jerome Foster?

9 A Yes, sir.

10 Q Do you understand that it is not necessary for me  
11 to accept your plea of guilty, but I want to make sure that  
12 before I do it that you understand your rights and that you  
13 are doing it completely voluntarily. For example, do you  
14 know that if you pleaded not guilty you would be entitled to  
15 a jury trial?

16 A Yes, sir.

17 Q Do you know that you could have had compulsory  
18 process in order to obtain witnesses on your behalf?

19 A Yes, sir.

20 Q Do you know that at such a trial the government  
21 would have to call witnesses and convince the jury beyond a  
22 reasonable doubt that you were guilty?

23 A Yes, sir.

24 Q Do you understand the type of penalty which can  
25 be imposed in connection with this? For example, do you

1 w  
2 know that there is a possible fine of \$1,000 and that you  
3 could be sentenced to jail for up to ten years for pleading  
4 guilty to this count?

5 A Yes, sir.

6 Q Do you know that?

7 A Yes, sir.

8 Q Have any threats or promises been made to you to  
9 induce you to plead guilty?

10 A No, sir.

11 Q Do you have any understanding or did anyone make  
12 a prediction even as to what the Court would sentence you to  
13 if you pleaded guilty?

14 A No, sir.

15 Q In fact, you did commit the offense; is that  
16 correct?

17 A Yes, sir.

18 Q And you do wish to plead guilty to it?

19 A Yes, sir.

20 Q At the present time are you under the influence  
21 of narcotics, alcohol or any other addictive substance?

22 A No, sir.

23 THE COURT: All right, the Court will accept the  
24 plea of guilty.

25 MR. JUPITER: Your Honor, since the defendant is



1 w  
2 nineteen and a half, he comes within the provisions of the  
3 Youth Correction Act. May he be apprised of the penalties  
4 under that act; that he is subject to supervision up to a  
5 period of six years.

6 BY THE COURT:

7 Q Do you understand that?

8 A Yes, sir.

9 Q The United States Attorney has indicated to you  
10 that you could be under supervision for six years but I  
11 want you to understand that it is possible for this Court  
12 not to sentence you under that act but to sentence you to  
13 the ordinary, regular statutory punishment. Do you under-  
14 stand that?

15 A Yes, sir.

16 THE COURT: All right, the Court finds --

17 MR. JUPITER: Your Honor, the Court did not in-  
18 quire what the defendant did and the actual act he did.

19 BY THE COURT:

20 Q Mr. Westentaum, would you be good enough to tell  
21 me exactly what happened in connection with the check which  
22 is attached to the first page of the information?

23 A I was given it and I signed it and I tried to cash  
24 it.

25 Q Did you cash it?



1 W

2 A Yes, sir.

3 THE COURT: Mr. Jupiter, is there anything else?

4 MR. JUPITER: There were two counts in the in-  
5 formation.

6 Q Are you pleading guilty to both counts, Mr. Kesten-  
7 baum?

8 A Yes, sir.

9 Q And you understand the difference between the two  
10 counts?

11 A Yes, sir.

12 THE COURT: Counsel, the information which I have  
13 before me does not contain two counts, it contains four, un-  
14 less I am wrong.

15 MR. JUPITER: Yes. He has pleaded to two, your  
16 Honor.

17 Is that correct, Mr. Rosenberg?

18 MR. ROSENBERG: Yes.

19 THE COURT: The first two counts?

20 MR. JUPITER: The first two, your Honor.

21 THE COURT: All right. The Court finds that the  
22 defendant's plea of guilty is made voluntarily with full  
23 knowledge of the consequences of his act and the possibilities  
24 of being sentenced for it.

25 Under the circumstances, since I have taken the

1 w  
2 plea of guilty, the case will be assigned to me without re-  
3 gard to the random selection.

4 PROBATION OFFICER: April 24th, your Honor?

5 THE COURT: All right. Sentence will be on April  
6 24th at four o'clock in the afternoon in Room 2804 of this  
7 building.

8 MR. JUPITER: Your Honor, the defendant is re-  
9 leased on his own recognizance, and the government would con-  
10 sent to a continuation of that.

11 THE COURT: Mr. Kestenbaum, you are going to be  
12 required to go down and discuss this matter with the Proba-  
13 tion Service. It would be of great aid to yourself to sit  
14 there and tell them the truth, the complete truth, and not  
15 only about this particular incident but about your entire  
16 background. I would also recommend that you continue to see  
17 your medical psychiatrist; that might be of some help to you,  
18 too.

19 MR. ROSENBERG: Thank you, your Honor. Parole  
20 continued?

21 THE COURT: Parole continued.  
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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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:  
UNITED STATES OF AMERICA, :  
:  
vs. : 73 Cr. 212  
:  
RICHARD KESTENBAUM, :  
:  
Defendant. :  
:  
-----X

Before;

HON. KEVIN THOMAS DUFFY, District Judge.

New York, May 15, 1973;  
4.00 o'clock p.m.  
(Room 128)

APPEARANCES:

WHITNEY NORTH SLYMOUR, JR., Esq.,  
United States Attorney for the  
Southern District of New York;  
BY: JOHN P. COONEY, JR., Esq.,  
Assistant United States Attorney.  
THEODORE ROSENBERG, Esq.,  
Attorney for Defendant.

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1 jks

2 THE CLERK: U.S.A. versus Richard Kestenbaum.

3 Is the Government ready?

4 MR. COONEY: Government is ready, your Honor.

5 THE CLERK: Defendant ready?

6 MR. ROSENBERG: Defendant is ready.

7 THE CLERK: Both sides ready, your Honor.

8 THE COURT: Mr. Rosenberg, do you know of any  
9 reason why the Court should not pass sentence upon the  
10 defendant at this time?

11 MR. ROSENBERG: No legal reason why sentence  
12 should not be imposed at this time, if your Honor please.

13 The defendant asked that I address the Court in  
14 his behalf.

15 THE COURT: All right. Let me just back up.

16 Mr. Cooney, does the Government have anything  
17 to say at this point?

18 MR. COONEY: No, your Honor. The Government  
19 has nothing to say.

20 MR. ROSENBERG: Your Honor, I wonder whether  
21 or not the Court can consider granting this defendant  
22 youthful offender treatment before sentence is imposed and  
23 sentence him as a youthful offender.

24 THE COURT: I will consider it. I have  
25 considered it.

1 jks

2 Go ahead.

3 MR. ROSENBERG: Now, if your Honor please, I  
4 know that the Court has a full and complete probation  
5 report, and I would like to point out that the time this  
6 defendant got involved in this crime which, of course, is  
7 not a crime of violence, but nevertheless is very serious,  
8 he was under the influence of drugs.

9 Now since that time he has made a sincere effort  
10 to rehabilitate himself. He has been working and going  
11 to school, been going to a psychiatrist.

12 THE COURT: Where is he working?

13 MR. ROSENBERG: Well, he has been working with  
14 his mother in antiques, and I understand that he has a  
15 job coming up next week, so that he will be working on two  
16 jobs, and he was going to school at night, and he has  
17 been going to the psychiatrist, and I think the probation  
18 report will reflect that.

19 So it would appear, sir, that this defendant  
20 has made a sincere effort to rehabilitate himself, and I  
21 think that this is essentially what justice is, and I  
22 ask the Court to give him the opportunity, if this is  
23 what he wants, and this is the manner in which he is  
24 attempting to straighten his life out, to either give him  
25 strict probation or some sort of supervision other than



1 jks

2 structured environment.

3 I think this boy can make it. I think he  
4 has shown the effort, and I ask the Court, despite the  
5 seriousness of the charges, to give him that opportunity.

6 THE COURT: All right.

7 Mr. Kestenbaum, do you have anything to say?

8 THE DEFENDANT: The attorney spoke for me.

9 THE COURT: You know, Mr. Kestenbaum, I have  
10 gone through the pre-sentence report. I note you come  
11 from a good home and you have apparently loving parents,  
12 and I would hope that you recognize the torture that  
13 you put them through, not only in your addiction, but in  
14 the crimes that you have been charged with and the one  
15 you pleaded or the counts that you pleaded guilty to.

16 All right.

17 It is the judgment of this Court that the  
18 defendant be placed on a probation under the Youth Correc-  
19 tions Act with four special provisions of probation:

20 No. 1. There was \$140 involved. That money  
21 is to be restored to the United States Government.

22 The defendant is also to continue his partici-  
23 pation in the psychotherapy until such time as the doctor  
24 releases him and advises the Probation Department of his  
25 release.

1 jks

2 3. He has got to get himself a job. I don't  
3 mean a job working with his mother. I want him to get a  
4 job either full-time or part-time where he would be  
5 basically expending his energies in work rather than  
6 looking for trouble.

7 And fourthly, as a special condition of  
8 probation, there is to be a continued abstinence from  
9 drugs.

10 All right?

11 Mr. Kestenbaum, as I said, the crime you have  
12 committed is not only a crime against the United States of  
13 America, it is also a crime against your parents and  
14 relatives, and that is something that you are going to  
15 have to live with for the rest of your life.

16 All right, Counselor. There are, I believe  
17 four counts to this indictment. The defendant has  
18 pleaded guilty to Counts 1 and 2.

19 Do you have a motion?

20 MR. ROSENBERG: Yes, your Honor. I thought  
21 the Government would move.

22 MR. COONEY: The Government moves that Counts 3  
23 and 4 be dismissed, your Honor.

24 THE COURT: All right.

25 Granted. So ordered.

1 jks

2 MR. ROSENBERG: Thank you, Judge.

3 THE COURT: The time of probation is to be for  
4 a period of two years.

5 MR. ROSENBERG: Thank you, your Honor.

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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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4 THE UNITED STATES OF AMERICA, :

5 :

6 vs : 73 Cr 212

7 :

8 RICHARD KESTENBAUM, :

9 Defendant. :

10 - - - - -x

11 Before:

12 HON. KEVIN THOMAS DUFFY,

13 District Judge.

14 February 21, 1975  
15 10:00 o'clock a.m.

16 New York, New York

17 APPEARANCES:

18 PAUL J. CURRAN,  
19 United States Attorney for the  
20 Southern District of New York

BY: JOEL M. ROSENTHAL, ESQ.,  
Assistant U. S. Attorney

21  
22 THEODORE ROSINBERG, ESQ.,  
23 Attorney for defendant

24 ALSO PRESENT:

25 JOHN GUTMAN, ESQ.,

EUGENE WESLEY, JR.

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2 THE COURT: This is a violation of probation,  
3 73 Cr 212, United States of America against Richard Kestenbaum.

4 Is Richard Kestenbaum present?

5 MR. GUTMAN: Your Honor, if I may, prior to the  
6 proceedings, my name is John Gutman. I am with the Federal  
7 Defender Service. On the arraignment of the violation of pro-  
8 bation I was assigned by the magistrate.

9 I understand Mr. Rosenberg is now the attorney  
10 who was called in by the Court and intends to be the attorney.

11 I, therefore, most respectfully ask to be relieved.

12 THE COURT: You are relieved.

13 MR. ROSENBERG: Good morning, your Honor.

14 THE COURT: Good morning, Mr. Rosenberg. How are  
15 you?

16 MR. ROSENBERG: Fine.

17 Your Honor, I had occasion to speak to the proba-  
18 tion officer and to the defendant and I think we have come  
19 to a reasonable conclusion with respect to this violation.

20 I understand it is about three or four specifications.  
21 The defendant is prepared today --

22 THE COURT: Do you have a copy?

23 MR. ROSENBERG: I don't have a copy of it. The  
24 Legal Aid Society has it, I don't have a copy of it, although  
25 I did read it.



1 91

2 THE COURT:: Mr. Clerk, read the specifications.

3 THE CLERK: Specification No. 1, the probationer  
4 failed to report on July 16, 1974 as instructed.

5 Specification 2, the probationer has filed to par-  
6 ticipate in our drug abuse program as instructed by the U.S.P.O.

7 THE COURT: That is the United States Probation  
8 Office.

9 THE CLERK: Specification No. 3, the probationer  
10 did not make the \$146 restitution ordered by the Court as a  
11 special condition of probation.

12 Specification No. 4, the probationer has failed  
13 to maintain gainful employment or continue in therapy as  
14 directed by the Court.

15 Specification No. 5, the probationer left this  
16 district and went to Florida without prior permission.

17 THE COURT: Mr. Kestenbaum, do you admit or deny  
18 the specifications of violations?

19 MR. ROSENBERG: If your Honor please, the pro-  
20 bationer is prepared to admit specification No. 3, failure  
21 to pay the \$146.

22 (The Court interrogated the defendant  
23 as follows:)

24 Q Mr. Kestenbaum, do you realize that if you did not  
25 admit specification No. 3 that the probation office would

1 gt

2 have to prove the specification against you?

3 A Yes.

4 Q Do you know that the government would have to call  
5 witnesses and your counsel would be entitled to cross examine  
6 those witnesses?

7 A (Nodding head.)

8 THE COURT: The record should reflect the proba-  
9 tioner has nodded yes to both of those questions.

10 Q Basically, the charge against you in this vio-  
11 lation of probation is that you did not repay a sum of money  
12 which was to be in retitution.

13 Do you understand that?

14 A Yes.

15 Q Do you understand that by admitting this particu-  
16 lar violation of probation it is possible for this Court  
17 to put you in jail or continue you on probation?

18 A Yes, sir.

19 THE COURT: What would the maximum be?

20 MR. ROSENTHAL: Ten years and/or a thousand  
21 dollars fine.

22 Q Did you hear that?

23 A Yes, sir.

24 Q And you are still willing to admit the violation,  
25 is that right?



1 gt

2 A Yes.

3 Q Did anybody make any threats or promises to you?

4 A No, sir.

5 Q Did any one even make a suggestion as to what I  
6 might sentence you to for this violation?

7 A No.

8 THE COURT: Mr. Rosenberg, do you know of any rea-  
9 son whatsoever why I should not accept the admission of this  
10 violation of probation?

11 MR. ROSENBERG: No, sir.

12 THE COURT: I so find that the admission is volun-  
13 tary and it is being done knowledgeably and that it is  
14 appropriate for this Court to accept the admission.

15 Mr. Rosenberg?

16 MR. ROSENBERG: Your Honor, I couldn't hear you  
17 too well. How are you feeling?

18 THE COURT: I am sorry, I can't hear me too well,  
19 either.

20 BY THE COURT:

21 Q Mr. Kestenbaum, do you deny the other specifications?

22 A Yes.

23 THE COURT: I will hear from you, Mr. Rosenberg.

24 MR. ROSENBERG: If your Honor please, the violation  
25 that the defendant has pled to, I believe that it was his

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2 appraisal that he could have paid this at any time within the  
3 two years that he was placed on probation.

4 I think that the defendant is somebody that the  
5 Probation Department could work with, your Honor. I feel to-  
6 day, as I did at the time we took the plea, that he is worthy  
7 of being saved. I think he will make an effort in that direc-  
8 tion.

9 I ask the Court to continue this defendant on pro-  
10 bation. I don't believe he is going to be a disappointment  
11 to the Court, to himself or to the family.

12 MR. ROSENTHAL: Your Honor, the United States  
13 Attorney's Office has no position in the matter. However, if  
14 the probation office has some comments, I am sure --

15 THE COURT: I will hear from the probation officer.  
16 Are you ready to take a position?

17 MR. WESLEY: No, sir, your Honor. The memorandum  
18 which I gave you speaks for itself.

19 THE COURT: Mr. Rosenberg, are the parents of  
20 this defendant present?

21 MR. ROSENBERG: Yes, they are.

22 THE COURT: Do you want to be heard?

23 MR. ROSENBERG: If your Honor please, I spoke to  
24 the parents and they have indicated to me that since the time of  
25 this occurrence, he has been staying home and he has been



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2 staying out of trouble and they would like the Court to know  
3 about it.

4 THE COURT: Mr. Kestenbaum, do you have anything to  
5 say for yourself?

6 THE DEFENDANT: No, sir.

7 THE COURT: The first time around I indicated my  
8 belief that a certain amount of leniency should be given to you.  
9 I am not sure that you shaped up and I am not sure that you  
10 were attempting or are attempting to justify the trust of this  
11 Court in you, nor am I terribly satisfied that you justify  
12 the trust of the probation office.

13 I am sorely inclined to remand you, but I have  
14 received a recommendation from the probation office that the  
15 probation may continue.

16 If I was the probation officer, most likely I  
17 would not make that recommendation. I just saw you a couple of  
18 times, but they see you quite frequently and you have not in  
19 the slightest bit shaped up. You have not justified their  
20 trust in you.

21 In view of the fact that they still trust you,  
22 I am willing to continue you on probation. However, the pro-  
23 bation will be extended for one year so that during that year  
24 somehow or another you can prove that you are worthy of their  
25 trust and possibly also prove to your parents that you are

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2 worthy of their trust, also.

3 The other conditions of probation will continue.

4 The probation is to terminate on May 14, 1976.

5 MR. ROSENBERG: Thank you, Judge.

6 MR. ROSENTHAL: Thank you, your Honor.

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UNITED STATES OF AMERICA

v.

RICHARD KESTENBAUM

73 Cr. 212

October 14, 1975,  
10 A.M.

Before: Hon. Kevin Thomas Duffy, District Judge.

For the Government: John P. Cooney, Esq., Assistant U.S.  
Attorney.

For the Defendant: Federal Defendant Services Unit,  
By: Jack Lipson.

Present: Eugene Wesley, U.S. Probation Officer.

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THE COURT: United States of America v. Richard  
Kestenbaum, 73 Cr. 212.

MR. COONEY: The government is ready your Honor.

MR. LIPSON: The defendant is ready.

THE COURT: Mr. Wesley, you have had a chance  
to review the information which has been supplied to me by  
the Probation Department, is that correct, sir?

MR. WESLEY: Yes, sir.

THE COURT: Pardon?

MR. WESLEY: Yes, sir.

If you are referring to the memorandum --

THE COURT: Yes.

MR. WESLEY: Yes, sir.

THE COURT: This includes, does it not, sir, the  
letter from the Lower East Side Service Center?

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2 MR. WESLEY: Yes, sir.

3 THE COURT: Mr. Lipson, you have seen the memorandum  
4 from the Probation Department; correct?

5 MR. LIPSON: Your Honor, I have seen, I believe,  
6 everything up through a memorandum of the Probation Department  
7 dated September 11th with the exception of the original  
8 piece that is reported in this case, which was not available  
9 in your chambers when I came to read the materials.

10 I would like to listen at some point to read that  
11 before your Honor decides what to do in this case.

12 The defendant, as your Honor is aware, denied  
13 specifications when we met last, and I had an opportunity  
14 to speak to him on several occasions since then, and it is  
15 his desire at this time to admit the second specification.

16 THE COURT: Mr. Clerk, read the second specification.

17 THE CLERK: The Probation office charges you  
18 with the following specification: That you have failed to  
19 maintain steady employment, specification number 2.

20 How do you plead, guilty or not guilty?

21 THE COURT: No. Do you admit or deny?

22 THE CLERK: Do you admit or deny specification  
23 number 2?

24 THE DEFENDANT: I do.

25 THE COURT: Mr. Lipson, would you be willing to



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2 go forward with sentence presently?

3 MR. LIPSON: Well, your Honor, I would like the  
4 opportunity to read the original report.

5 I should inform the Court that I have spoken to  
6 Mr. Wesley on at least two occasions since we met last,  
7 and he has indicated to me his views as to what he feels  
8 the Court should do in this situation.

9 If your Honor wishes to go forward with sentence  
10 now, if you will give me just a few minutes to read the  
11 original report I would be prepared to go forward.

12 THE COURT: Do you have it?

13 MR. WESLEY: I have it (handing to Mr. Lipson.)

14 THE COURT: I will give you five minutes to read it.

15 MR. LIPSON: Thank you.

16 (Recess)

17 THE COURT: All right Mr. Lipson, have you had a  
18 chance to go through the original pre-sentence report?

19 MR. LIPSON: Yes, your Honor.

20 THE COURT: Is there anything you would like to  
21 say at this point?

22 MR. LIPSON: Yes, your Honor.

23 Your Honor, I recognize that this is the second  
24 time that Mr. Kestenbaum has come before your Honor for  
25 a violation of probation.



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2 Despite the fact that he has failed to live up  
3 to the terms of his probation on two occasions, I think  
4 that in a larger measure some of the observations that were  
5 made at the time of the original sentence about him are  
6 still accurate.

7 I think he is basically a decent human being and  
8 not a hardened criminal.

9 The problems that he has encountered that have led  
10 him to be here before you again are problems having to do  
11 with getting his own life in order. He has not engaged in  
12 any new criminal activity. He has just been unable to get  
13 himself out of the rut into which he has fallen in terms  
14 of getting a job, establishing himself on his own and coping  
15 with his emotional problems.

16 Mr. Wesley has been kind enough to speak with  
17 me quite frankly about his views of the defendant's problems  
18 and what he feels might be in order, and I understand that  
19 he has spoken with the defendant as well. The defendant  
20 has spoken with me.

21 I think in large measure we are well in agreement  
22 as to what Mr. Kestenbaum's problems are.

23 For example, I think we all agree that his use  
24 of methadone is not something that is having a beneficial  
25 effect on him. We also all agree that his continued living

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2 environment with his parents perhaps is not the best situation  
3 for him.

4 I think, however -- I know, however, that I would  
5 differ with some of the conclusions that Mr. Wesley has  
6 reached.

7 I understand that the Probation Department feels  
8 that at least a short period of incarceration is in order  
9 here, and study as well.

10 I would propose that if your Honor is considering  
11 imposing a sentence, that the following alternative might  
12 perhaps help achieve those objectives equally well:  
13 Specifically I would ask that your Honor consider continuing  
14 Mr. Kestenbaum on probation under the following conditions:

15 Number 1, that he take steps to detoxify himself  
16 from methadone. I understand that the Bernstein Clinic  
17 at the Beth Israel Hospital has a program, a 21-day de-  
18 toxification program, in which Mr. Kestenbaum could enter  
19 the hospital for a period of three weeks and would be taken  
20 off methadone.

21 Secondly, I think Mr. Kestenbaum should be im-  
22 pressed with the importance of his resuming psychiatric  
23 treatment.

24 Along those lines I have been in contact with  
25 several agencies that could make available to him a battery



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2 of psychiatric and psychological tests. After those test  
3 results are received they would recommend a course of treat-  
4 ment which I believe he would be willing to follow.

5 Now, my proposal does not solve, perhaps, Mr.  
6 Kestenbaum's greatest problem or one of his problems, and  
7 that is the fact that as long as he is residing at home  
8 he does not seem to be able to assume responsibility on his  
9 own.

10 Perhaps your Honor could in continuing him on  
11 probation recommend that upon his completion of the de-  
12 toxification program that he reside at the Community Treatment  
13 Center until such time as he is able to establish himself  
14 in an apartment on his own and to secure a job with which  
15 he could support himself and pay the rent.

16 I think that this proposal would avoid the neces-  
17 sity for incarceration and give Mr. Kestenbaum the op-  
18 portunity to deal with the problems that all of us recog-  
19 nize that he has.

20 THE COURT: Mr. Kestenbaum, do you have anything  
21 to say for yourself?

22 THE DEFENDANT: No, sir.

23 THE COURT: Mr. Cooney, I assume the government  
24 has nothing to say, right?

25 MR. COONEY: I think Mr. Wesley has a few things



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2 he would like to address the court on.

3 THE COURT: Sure.

4 MR. WESLEY: Your Honor, as Mr. Lipson has  
5 indicated, we have discussed various plans of treatment  
6 for Ritchie, but we basically differ as to how this should  
b2 7 be arrived at.

8 I do not feel that detox at Beth Israel or a  
9 related type of facility during a 21-day period would provide  
10 ample protection from immediate reversion to methadone,  
11 either illegal methadone or possibly the need to go back  
12 on methadone.

13 I feel that this can best be accomplished by having  
14 him committed for study, during which time he can be with-  
15 drawn from methadone, and if there are problems related  
16 with this withdrawal, the medical personnel there could treat  
17 him with various medications to help ameliorate the problem.

18 We feel that during the course of study he would  
19 not only be physically detoxed from methadone but that  
20 he could perhaps have a better perspective of his total  
21 situation after having been removed from it for a period of  
22 two months.

23 Should the state conclude that probation would  
24 be the appropriate sentence, I then would concur with Mr.  
25 Lipson that perhaps a commitment to the Community Treatment

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2 Center here in New York for the purpose of sleeping and  
3 eating and looking for work by day, and, perhaps, if indicated  
4 by study, that psychotherapy or related type of treatment  
5 modalities are indicated, that too could be arranged in  
6 that particular time.

7 I feel that after a period of residence at the  
8 CTC, during which time he could accumulate sufficient funds  
9 to sustain himself, have his own apartment and pay for his  
10 personal needs, that part of the problem would be eliminated,  
11 and that is mainly, he lacks motivation, and I do not feel  
12 that at this particular point of time that he is sufficiently  
13 motivated to benefit from continued probation at this time.

14 THE COURT: Tell me, Mr. Wesley, in order for  
15 the study to be imposed, it is my impression -- I may be  
16 wrong -- that I would have to sentence him to the maximum;  
17 is that correct?

18 MR. WESLEY: I am not absolutely certain on that.

19 MR. COONEY: Your Honor, Mr. Lipson and I have  
20 discussed that very briefly before we began today.

21 The defendant was originally sentenced under  
22 Section 5010(e) of Title 18. Now, 5010(e) provides for  
23 a 60-day study and does not have a provision as does Section  
24 4208, I believe, of the maximum sentence on the face of it  
25 before you could sentence the defendant for the purpose of



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2 this 60-day study without imposing the maximum sentence under  
3 that section.

4 I must say that unfortunately is our examination  
5 of the basic statute. I don't believe either one of us have  
6 had a chance to really research it, but I believe the court  
7 can just sentence him for a study.

8 THE COURT: Mr. Kestenbaum, I came out here fully  
9 intending to put you in jail for two years. You have had  
10 now three bites out of the apple. There was the first  
11 offense and the violation of probation and now a second  
12 violation. Three times. The first two times I went along  
13 with the hope that you could be completely rehabilitated  
14 on the outside. Your counsel, the Probation Department,  
15 the government, all feel that you need to be detoxified;  
16 that you lack responsibility; you have got to get out on  
17 your own; that you have got to go and grow up. It was my  
18 impression that you did not deserve another chance. I am  
19 not terribly sure that you do.

20 It is the judgment of this court that your probation  
21 be revoked; that on count 1 of the underlying indictment  
22 that you be placed in a study section under 5010(e) for  
23 a period of 60 days or as long thereafter as may be required  
24 to complete such study.

25 On count 2 of the indictment, that you be placed



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2 on probation for a period of two years. A special condition  
3 of that probation would be that after the study is completed,  
4 that you comply with all the necessary terms of the probation,  
5 including the submission to psychiatric treatment that is  
6 so indicated, and including such other things as must be  
7 imposed at the end of the study.

8 I want you to know, Mr. Kestenbaum, that the im-  
9 position of probation on one count does not mean that you  
10 are going to get it. If the study shows me exactly what  
11 I think it is going to show, then under the first count  
12 of the indictment I am going to remand you for a jail sentence.

13 If, however, there is a recommendation of the  
14 Probation Department, and if you ever get fouled up again  
15 I want you to know that you will spend some time in jail,  
16 as long as I possibly can give you. This is the end of the  
17 road.

18 All right, marshal.

19 MR. LIPSON: Your Honor, may we approach the bench?

20 THE COURT: Sure.

21 (Counsel approach the bench and conferred with  
22 the court off the record.)

23 THE COURT: After consultation with counsel it  
24 was recommended to me that I vacate the imposition of  
25 probation on the second count and make the sentence under

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2 5010(e) on the first count run concurrently so that after  
3 the study is done we can then arrive at an appropriate  
4 sentence.

5 Mr. Lipson, I understand that you have an  
6 application?

7 MR. LIPSON: Yes, your Honor.

8 My application is for an adjournment of the  
9 defendant's surrender until next Tuesday, at which time it  
10 would be my application that he surrender directly at the  
11 facility where he is to be studied, or, if not, at the  
12 marshal's office at the courthouse.

13 THE COURT: All right, he can surrender next  
14 Tuesday at the marshal's office next door.

15 Mr. Kestenbaum, you are getting so many breaks,  
16 it is incredible. Don't foul up again.

17 PROBATION OFFICER: Time of surrender?

18 THE COURT: 10 o'clock in the morning.

19 MR. LIPSON: Thank you, your Honor.

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :  
:  
vs. : 73 Cr. 212  
:  
RICHARD KESTENBAUM, :  
:  
Defendant :  
:  
-----X

Before:

HON. KEVIN T. DUFFY,

District Judge

January 9, 1976  
Room 618; 2:20 o'clock, p.m.

APPEARANCES

JOHN P. COONEY, JR., ESQ.,  
Assistant United States Attorney

THEODORE ROSENBERG, ESQ.,  
Attorney for the defendant

ALSO PRESENT:  
EUGENE WESLEY,  
Probation Department



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2 (Case called.)

3 THE COURT: United States of America against  
4 Richard Kestenbaum, 73 Criminal 212. Is the government ready?

5 MR. COONEY: Your Honor, the government is ready.  
6 Mr. Wesley from Probation has not arrived yet. I was just  
7 trying to reach him on the phone when court began.

8 THE COURT: Mr. Rosenberg, as counsel for the  
9 defense have you seen the results of the study?

10 MR. ROSENBERG: No, sir.

11 THE COURT: Okay. It is a fairly lengthy study.  
12 I'd appreciate it if you would take a look at it.

13 MR. ROSENBERG: I'd like to, your Honor.

14 THE COURT: We'll take a ten-minute recess.

15 (Recess)

16 THE COURT: United States of America against  
17 Richard Kestenbaum.

18 MR. COONEY: The government is ready, your Honor.

19 THE COURT: Mr. Rosenberg, you have had an  
20 opportunity to review the study prepared by the classification  
21 section. Is that correct, sir?

22 MR. ROSENBERG: Yes, sir.

23 THE COURT: Does the government have anything to  
24 say?

25 MR. COONEY: No, your Honor.

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2 MR. ROSENBERG: Your Honor, I'd like to be heard.  
3 If your Honor please, when the defendant committed the crime  
4 that he got involved with, this Court in its judicial wisdom  
5 decided to give him a chance to straighten out and placed him  
6 on probation. Now having violated the probation I can  
7 understand the hesitancy of the Court to take another chance  
8 on the defendant. However, your Honor, he's been away for  
9 81 days. He seems to feel that he's got everything together  
10 now. He feels that by virtue of the fact that he was using  
11 methadone pills he still wasn't in a position to function.

12 Having been detoxified, having done the time, he  
13 feels that now he's in a better adequate position to go out  
14 and face the world. He has a home to go to. He'd like to  
15 live with his sister. I'm informed that the sister wants  
16 him there. As a matter of fact, she was supposed to be in  
17 court today but she had to go to work. She just could not  
18 get out of it.

19 Rather than a halfway house, your Honor, a continued  
20 probation, if the Court will grant this defendant the  
21 opportunity perhaps he can straighten out his own life. If  
22 the Court is still hesitant then my suggestion would be, why  
23 don't we defer the sentence for six months and give him an  
24 opportunity to find out in fact and in truth he can straighten  
25 himself out, if he really knows what he's doing, and if he



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2 proves to the Court at the end of that period of time that  
3 he's all together, then, of course, the Court will act  
4 accordingly.

5 If to the contrary he does not mature, he does not  
6 get a job and he does not straighten out, then, of course,  
7 the Court is in a position to impose a sentence which I'm  
8 sure the defendant will be aware of. I ask the Court to  
9 consider this before imposing sentence.

10 THE COURT: Mr. Kestenbaum, do you have anything  
11 to say for yourself?

12 THE DEFENDANT: No, sir.

13 THE COURT: This is not the first time that you've  
14 violated probation. According to the records that I have  
15 in front of me the probation violation, at least the judgment  
16 of it was entered on February 21, 1975. Your probation at  
17 that point was continued.

18 Then we come up to October 14, 1975 when I had you  
19 committed for study. The thing that gets me is the fact  
20 that everything I can find out about you is your mother and  
21 father and family are extremely supportive of you. You've  
22 had your chances. Seems to me that you would not take  
23 counseling necessary for your rehabilitation when you were  
24 out on the street. It is difficult, particularly with a  
25 person of your age, for a judge to impose sentence, but how



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2 many times do you get another chance?

3 It is the judgment of this Court that the  
4 defendant, Richard Kestenbaum, will be committed under the  
5 Youth Corrections Act for a period not to exceed two years.  
6 During that period of time, Mr. Kestenbaum, please get your-  
7 self squared away. You've got your whole life ahead of you.  
8 If you need the structure of the society of a correctional  
9 institution, you are in tough shape.

10 If you get yourself squared away prior to the end  
11 of that period of time you can get out, but when you do get  
12 out, keep yourself square away. You have a whole lifetime  
13 ahead of you.

14 Is there a marshal here?

15 MR. ROSENBERG: Yes, sir.

16 THE COURT: Mr. Wesley, is there a marshal here?

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

-against-

RICHARD KESTENBAUM,

Defendant.

Docket No. 73 Cr. 21

Hon. Kevin Duffy  
District Court Judge

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NOTICE OF APPEAL

NOTICE is hereby given that RICHARD KESTENBAUM appeals to the United States Court of Appeals for the Second Circuit from the judgment of conviction entered on January 9th, 1976, for a term of 2 years imprisonment for Violation of Probation.

DATED: January 19th, 1976, Brooklyn, New York.

*Theodore Rosenberg*  
THEODORE ROSENBERG, Esq.  
Attorney for Defendant  
125 Schermerhorn Street  
Brooklyn, New York 11201  
Tel. (212) 858-0589

TO: CLERK OF THE DISTRICT COURT  
Foley Square  
New York, New York